



**Car & General (Kenya) Limited v Aligula & another (Civil Appeal 381 of 2019)  
[2022] KEHC 15843 (KLR) (Civ) (29 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15843 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 381 OF 2019**

**JK SERGON, J**

**NOVEMBER 29, 2022**

**BETWEEN**

**CAR & GENERAL (KENYA) LIMITED ..... APPELLANT**

**AND**

**NAPHTALI CHUNGANI ALIGULA ..... 1<sup>ST</sup> RESPONDENT**

**JOHNSON MUTEMI NGUTU ..... 2<sup>ND</sup> RESPONDENT**

*((Being an appeal against the ruling and order of Honourable B. J. Ofisi (Mrs.) (Resident Magistrate) delivered on 5th July, 2019 in MILIMANI CMCC no. 7132 of 2017))*

**JUDGMENT**

1. At the onset, the 1<sup>st</sup> respondent herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated October 3, 2017 and sought for reliefs against the appellant and the 2<sup>nd</sup> respondent in the nature of general and special damages plus costs of the suit and interest thereon, arising out of a road traffic accident involving the motorcycle registration number xxxx ('the subject motorcycle') alleged to belong to the appellant and at all material times being ridden by the 2<sup>nd</sup> respondent. The claim is for negligence.
2. Subsequently, upon the request of the 1<sup>st</sup> respondent, an interlocutory judgment was entered against the appellant and the 2<sup>nd</sup> respondent jointly and severally on January 24, 2018 and the matter proceeded for formal proof. Upon close thereof, final judgment was delivered in favour of the 1<sup>st</sup> respondent and against the appellant and the 2<sup>nd</sup> respondent on January 31, 2019.
3. Consequently, the appellant filed the Notice of Motion dated April 12, 2019 and sought to set aside both the interlocutory and final judgments and further sought for leave to file its statement of defence. The Motion was opposed by the 1<sup>st</sup> respondent.



4. Upon hearing the parties on the aforesaid Motion, the trial court dismissed the Motion with costs vide the ruling delivered on July 5, 2019.
5. Being aggrieved by the aforementioned ruling, the appellant sought to challenge the same by way of an appeal. Through its memorandum of appeal dated July 8, 2019 the appellant put in a total of 24 grounds.
6. This court gave directions for the parties to file written submissions on the appeal. It is apparent from the record that the 2<sup>nd</sup> respondent did not participate in the appeal.
7. On the part of the appellant, it is submitted that no proper service of the summons to enter appearance was made upon it and cites inter alia, the case of *Agigreen Consulting Corp Limited v National Irrigation Board [2020] eKLR* in which the court stated the following:

' The manner of service of summons on a Corporation is set out in Order 5 rule 3 of the *Civil Procedure Rules* which states as follows:

3. Subject to any other written law, where the suit is against a corporation the summons may be served –
  - (a) On the secretary, director or other principal officer of the corporation; or
  - (b) If the process server is unable to find any of the officers of the corporation mentioned in rule 3(a) –
    - i. By leaving it at the registered office of the corporation;
    - ii. By sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
    - iii. If there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or
    - iv. By sending it by registered post to the last known postal address of the corporation.

From the aforesaid provisions, the Summons must, in the first instance, be served, 'on the secretary, director or other principal officer of the corporation', before resorting to other modes of service. The Affidavit of Service is clear that the Summons was not effected on any of the principal officers of the Company nor was any explanation given why the Process Server resorted to serving the Summons on the receptionist who was not a principal officer of the corporation. Moreover, the Process Server does not disclose whether the 'Receptionist' had authority to accept service of Summons on behalf of the principal officers of the Defendant. It must be recalled that default judgment is entered on the basis of an affidavit of service which must, on its face show, that service has been effected in accordance with the applicable rules. In this case, I find and hold that the Process Server did not comply with Order 5 rule 3(a) of the Civil Procedure Rules in effecting service on the Defendant.'

8. It is also the submission by the appellant that the affidavit of service on record contains untrue averments and cannot therefore be relied upon.



9. The appellant further contends that the trial court erred in not appreciating that it had annexed a draft statement of defence to its application and which raises triable issues for consideration, quoting the case of *Tree Shade Motors Limited v DT Dobie And Company (K) Limited & Another [1998] eKLR* where the court reasoned that when faced with an application seeking to set aside a default judgment, a court is obliged to examine the draft statement of defence on record in order to ascertain whether it raises triable issues.
10. The appellant generally submits that the 1<sup>st</sup> respondent has no reasonable cause of action against it and therefore urges this court to allow the appeal and to set aside the interlocutory judgment.
11. In retort, the 1<sup>st</sup> respondent who put in the submissions dated September 30, 2022 contends that service of summons was proper and that the summons contain the official stamp of the appellant.
12. The 1<sup>st</sup> respondent also contends that the appellant has no reasonable defence to his claim since the draft statement of defence does not raise any triable issues for consideration, citing among others, the case of *Jennifer Mwari v Peter M'amanja [2007] eKLR* where the court held that the defendant in that instance did not raise a good defence to the suit, in order to warrant the setting aside of a default judgment.
13. For all the foregoing reasons, the 1<sup>st</sup> respondent is of the view of that the appeal must fail.
14. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. It is clear that the appeal fundamentally lies against the trial court's decision to dismiss the appellant's application seeking to set aside the interlocutory judgment and further seeking leave to file its statement of defence out of time. I will therefore deal with the 24 grounds of appeal contemporaneously.
15. In the abovementioned Notice of Motion dated April 12, 2019 the appellant stated that the summons to enter appearance were neither served upon its registered office nor served upon any of its officials and/or employees.
16. The appellant stated that it undertook investigations which showed that the affidavit of service on record contained falsehoods, and that the alleged summons bore the stamp of an entity different from itself.
17. The appellant further stated that it only came to learn of the existence of the suit upon receiving the proclamation notices in execution of the decree by the 1<sup>st</sup> respondent.
18. It is the assertion by the appellant that the draft statement of defence which was annexed to the Motion raises triable issues regarding ownership of the subject motorcycle and the 2<sup>nd</sup> respondent, whom the appellant denies having any association with.
19. In his replying affidavit to the Motion, the 1<sup>st</sup> respondent stated that the affidavit of service on record shows that the summons were served upon the appellant's Sales Manager and that the said Manager acknowledged receipt of the summons and pleadings on behalf of both the appellant and the 2<sup>nd</sup> respondent.
20. The 1<sup>st</sup> respondent also stated that Car & General (Trading) Limited and the appellant are one and the same entities, thereby validating the service of summons.
21. On the subject of the draft statement of defence, it is the assertion by the 1<sup>st</sup> respondent that the same consists of mere denials and therefore does not raises any triable issues.



22. Upon hearing the parties on the Motion, the learned trial magistrate analyzed that the appellant has not met the threshold for granting the orders sought in the Motion since it had not availed its statement of defence for consideration, consequently dismissing the Motion.
23. Upon my re-examination of the material, it is apparent that the learned trial magistrate did not address her mind on the issue of service of summons.
24. That notwithstanding, from my study of the record, I am of the view that the issue of whether or not the appellant and Car & General (Trading) Limited are one and the same entity is neither here nor there.
25. In my view and in the absence of any credible evidence to indicate otherwise, it is more plausible than not that the summons to enter appearance and the pleadings were served upon the appellant.
26. This therefore brings me to the subject on whether the appellant's draft statement of defence raises triable issues.
27. Upon my perusal of the trial court record and material, it is apparent that the appellant had annexed its draft statement of defence to its Motion and hence the learned trial magistrate ought to have considered it, since in determining whether or not to set aside an ex parte/default judgment, a court is required to consider whether a party has a defence which raises triable issues, even where service of summons is deemed to have been proper.
28. I cite with approval the rendition in the case of *Tree Shade Motors Ltd v DT Dobie & Another (1995-1998) IEA 324* cited in the submissions by the appellant, thus:

' Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.'
29. Furthermore, the phrase 'triable issue' was defined by the Court of Appeal in the case of *[Ternic Enterprises Limited v Waterfront Outlets Limited \[2018\] eKLR](#)* thus:

' A triable issue' is an issue which raises a prima facie defence and which should go to trial for adjudication.'
30. The Court went on to appreciate that:

' The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend.'
31. From my study of the appellant's draft statement of defence, I observed that it denies ownership of the subject motorcycle at the time of the material accident and further denies having any knowledge of and/or association with the 2<sup>nd</sup> respondent.
32. In my view therefore, I am satisfied that the appellant's statement of defence raises triable issues which can only be adequately ventilated at the hearing of the suit.
33. In considering whether to set aside a default judgment, a court of law is also required to ascertain whether the respondent stands to be prejudiced. I equally note that the learned trial magistrate did not delve into this subject in her analysis.



- 34. In my view and upon my re-examination of the pleadings and material tendered before the trial court, there is nothing to indicate that the 1<sup>st</sup> respondent would be prejudiced in a manner that cannot be adequately compensated by way of costs, if the interlocutory judgment is set aside.
- 35. Upon taking into account all the foregoing factors hereinabove, I am convinced that it would be a proper exercise of my discretion to interfere with the impugned ruling and to grant the appellant the opportunity of defending the claim, upon setting aside the interlocutory judgment.
- 36. In the end therefore, I will allow the appeal. Resultantly:
  - i. The ruling delivered on July 5, 2019 is hereby set aside and is substituted with an order allowing the Notice of Motion dated April 12, 2019.
  - ii. The interlocutory judgment entered on January 14, 2018 and all consequential orders/ proceedings are hereby set aside and the suit is hereby reinstated.
  - iii. The appellant is granted leave to file and serve its statement of defence within 14 days from today.
  - iv. Costs of the Notice of Motion dated April 12, 2019 to abide the outcome of the suit.
  - v. In the circumstances of this appeal, a fair order on costs is to order which I hereby do, each party to bear its own costs of the appeal.

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this November 29, 2022.**

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**J. K. SERGON**

**JUDGE**

**In the presence of:**

- ..... for the Appellant
- ..... for the 1<sup>st</sup> Respondent
- ..... for the 2<sup>nd</sup> Respondent

